

Sri Lanka's improved, but still imperfect, Right to Information Bill

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What is the underlying rationale for RTI legislation?

- Agency problems arise when the agent's incentives and those of the principal are not perfectly aligned and conflicts of interest exist (which is always)
- Why can the agent get away with not acting in the best interest of the principal?
 - A first possible explanation is that the cost to the principal of removing or punishing the agent is too high relative to the benefit
 - A second, more widely applicable, explanation is the presence of information asymmetry. Information asymmetry arises when one party (the agent) is better informed than the other (the principal). Information asymmetry makes it difficult or even impossible for principals to know whether the agent is acting in their best interest, especially if crucial variables (such as the agent's effort or competence) are unobservable

Government is the agent; the people are the principals

- The incentives of the people and their agents (the government officials and the politicians are not perfectly aligned
- Even though the people can turf out politicians at periodic elections, that is harder to do re officials
- In the case of both officials and politicians, the information asymmetry is vast → RTI seeks to reduce the information asymmetry
- It follows that RTI should apply to entities that are agents of the people
 - Government (all levels)
 - Agents of government

Constitution has primacy: RTI included in the 19th amendment

- Certified on 15th May, published in Gazette of May 2015
- Right to information included as a fundamental right
- Good, but too much detail
- Language of RTI Bill will have to be consistent with that in 19th Amendment

19th Amendment: Article 14A

- (1) Every citizen shall have the right of access to any information as provided for by the law, being information that is required for the exercise or protection of a citizen's right held by:-
 - (a) the State, a Ministry or any Government Department or any statutory body established or created by or under any law;
 - (b) any Ministry of a Province or any Department or statutory body established or created by a statute of a Provincial Council;
 - (c) any local authority; and
 - (d) any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph.”

Restricting provisions

- Subsection (1) “as provided for by the law”
 - How will this be interpreted? RTI Law or any Law?
- “Required for the exercise or protection of a citizen’s rights”
 - Will this have to be established for every request?
 - Earlier versions of the 19th amendment used the wording “Required for the exercise or protection of the citizen’s rights”
 - This definition is broader – i.e. the rights being protected need not be that of the citizen accessing the information? But still a restriction
- The draft RTI Bill does not mention such restrictions
- Potential conflict; constitutional provisions will take precedence?

Possible conflicts with the bill

- Article 14A does not apply to private and not for profit organizations - unless they fall under subsection (d): “any other person, who is in possession of such information relating to any institution referred to in sub-paragraphs (a) (b) or (c) of this paragraph”
- Definition of public authorities in draft RTI includes
 - Non-governmental Organizations receiving funds directly or indirectly from the Government or Foreign Governments or International Organizations 46 (j)
 - a private entity or organization which is carrying out a statutory or public function or a statutory or public service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or that statutory or public service – 46 (g)

Last version of Bill: Operative section

- S. 3: Subject to the provisions of section 5 of this Act, every ~~person~~ citizen shall have a right of access to information which is in the possession, custody or control of a public authority.
 - What are exceptions specified in s. 5?
 - Who is a ~~person~~? citizen?
 - What is information?
 - What is meant by possession, custody or control?
 - Most importantly, what is a public authority?

Definition of ‘citizen’

- “Citizen” includes a body whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens; (section 46)
 - Circular definition, needs to be clarified?

What is a public authority? Definition starts off aligned with common sense

- S. 46. “Public authority” means –
 - A Ministry of the Government;
 - **Any body or office created or established by or under the Constitution;**
 - Superior and subordinate courts of record;
 - A Government Department;
 - A public corporation;
 - A company incorporated under the Companies Act, No.07 of 2007, in which the State, or a public corporation or the State and a public corporation together holds **twenty five per centum or more of the shares;**
 - Any department or other authority or institution established or created by a Provincial Council;
 - A local authority;

India: Definition of public authority in Right to Information Act of 2005

Section 2(h) of the RTI Act states: “public authority” means any authority or body or institution of self-government established or constituted—

- (a) by or under the Constitution;
- (b) by any other law made by Parliament;
- (c) by any other law made by state legislature;
- (d) **by notification issued or order made by the appropriate Government,** and includes any—
 - (i) body owned, controlled or substantially financed;
 - (ii) non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government

Inelegant drafting in LK v IN

- Why not use a consistent form as in India?
- We know that Parliament and Constitutional Council are constituted by the Constitution and are therefore Public Authorities
 - But are Government Ministries and courts specifically denoted because they are created by something other than the Constitution?
 - What is the status of Cabinet?

India: What constitutes control or/and ‘substantial’ financing?

- Not defined in the Act; definition in the Official Guide to RTI Act
- **“...bodies owned, controlled or substantially financed by the Central Government or a State Government and non-Government organizations substantially financed by the Central Government or a State Government also fall within the definition of public authority. The financing of the body or the NGO by the Government may be direct or indirect.”**

India: Entities brought within the ambit of “public authority” under this provision by courts

- Autonomous institutions such as sports associations:
 - Indian Olympic Association
 - Chandigarh Lawn Tennis Association
- Schools and educational trusts
- Registered societies, and cooperatives, e.g.,



Sri Lanka: Agent of agent, limited to the scope of the agency relationship

- S. 46(g): A private entity or organization which is carrying out a statutory or public function or a statutory or public service, under a contract, a partnership, an agreement or a license from the government or its agencies or from a local body, but only to the extent of activities covered by that statutory or public function or that statutory or public service;
- *Excellent correction, based on comments given during consultation*

Definitional elements not based entirely on principal-agent rationale

- A recognized political party or independent group; - *Previously included, removed from latest version of Bill*
- **Should it be included?**
 - *Not funded by the public; seeking to represent the public. Can be rationalized.*
- Non-governmental Organizations receiving funds directly or indirectly from the Government or Foreign Governments or International Organizations;
 - *Should be bounded to scope of relationship, no reason to bring in entire organization when government funding is small*
 - *Better if a threshold is set so that a small contract does not impose large costs of compliance*
 - *Assumes foreign governments/IOs are agents of the Sri Lankan public; and the NGOs are their agents*
 - *International Organization must be defined, or replaced by International Government Organizations (IGOs) which is a commonly understood category unlike IOs*
- Higher educational institutions including private universities and professional institutions;
- Private educational institutions including institutions offering vocational or technical education;
 - *Previous anomaly corrected, based on comments. But threshold may be advisable*

India: Entities funded by foreign governments not subject to RTI

- S 2 (a) "appropriate Government" means in relation to a public authority which is established, constituted, owned, controlled or substantially financed by funds provided directly or indirectly by
 - Central Government or the Union territory administration, the Central Government;
 - State Government, the State Government;
- Bodies funded by foreign governments do not fall under the Indian RTI Act
- *Logical because foreign governments are not agents of Indian public*

Insertions and deletions in latest draft

- Gone from the definition of Public Authority by the latest revision
 - A recognized Political Party or independent group
 - The Parliament
 - *Not good*
 - The Cabinet
 - *Good in terms of Cabinet papers and discussion; bad in terms of decisions*
- Unnecessary definition of 'Public funds' removed
- Included
 - Non-governmental Organizations receiving funds directly or indirectly from the Government or Foreign Governments or International Organizations;
 - Private educational institutions including institutions offering vocational or technical education

Definitions within definitions

- S.46 “Non governmental organization” means any organization formed by a group of persons on a voluntary basis and receiving funds directly or indirectly from the Government or international organizations and is of a non governmental nature;
- *But missing is definition of “international organization”; best to define as International Government Organization: “an organization composed primarily of sovereign states, or of other intergovernmental organizations. IGOs are established by treaty or other agreement that acts as a charter creating the group.” Examples include the United Nations, the World Bank, or the European Union. -- <http://www.uia.org/faq/yb3>*

Rather unusual provision on projects

- S.9(1) It shall be the duty of the President or the Minister as the case may be, to whom the subject pertaining to any project has been assigned, to communicate three months prior to the commencement of **(any work or activity relating to the initiation- this section deleted)** such project to the public generally, and to any particular persons who are likely to be affected by such project, in such manner as specified in guidelines issued for that purpose by the Commission, all information relating to the project that is available with the President or the Minister, as on the date of such communication.
 - For the purpose of this section, “project” means any project the value of the subject matter of which exceeds :-
 - in the case of foreign funded projects, one million United States dollars; and
 - in the case of locally funded projects, five million rupees.
- S.9(2) The President or a Minister, shall be required on written request made in that behalf by a member of the public, to make available updated information about a project referred to in subsection (1), throughout the period of its development and implementation. The information shall be made available on the payment of such fee, as shall be determined by the Commission for the purpose.

Possible explanations

- Could there be projects outside Ministries, Departments and other government structures?
- S.9 is not about rights, but about duties
 - Here the President/Minister is bound by an additional duty

Obligations of Public Authorities: 1. Duty to keep records cataloged & indexed for 10 years

- S7(1) It shall be the duty of every public authority to maintain all its records in such manner and in such form as is consistent with its operational requirements, duly catalogued and indexed.
- S7(2) All records being maintained by every public authority shall be preserved—
 - in the case of those records already in existence on the date of the coming into operation of this Act, for a period of not less than ten years from the date of the coming into operation of this Act.
 - in the case of new records **which are created** after the coming into operation of this Act, for a period of not less than twelve years from the date on which such record is created
- *Should apply only to public authorities outside government above a stated threshold; should specify that obligation extends only to commencement of principal-agent relationship with government*

Obligations of Public Authorities: 2.

Duty to submit reports annually

- S. 10. It shall be the duty of every public authority to submit to the Commission annually, a report containing the following information –
 - the number of requests for information received;
 - the number of requests for information which were granted or refused in full or in part;
 - the reasons for refusal, in part or in full, of requests received;
 - the number of appeals submitted against refusals to grant in part or in full, requests for information received; and
 - the total amount received as fees for granting requests for information.
- *Should be applicable only to subset of government agencies among public authorities to reduce cost of compliance and workload of RTI Commission*

Obligations of public authorities: 3. Duty to appoint Information Officer, or CEO to serve as Info Officer himself

- S. 23(1) Every public authority shall for the purpose of giving effect to the provisions of this Act, appoint, within three months of the coming into operation of this Act, one or more officers as Information Officers of such public authority and an officer designated to hear appeals :
 - Provided that until such time that an Information Officer is appointed under this subsection, the Head or Chief Executive Officer of a public authority shall be deemed to be the Information Officer of such public authority, for the purposes of this Act.
- *This is likely to be the most unpopular job in government service so making the Head of Public Authority the default IO is a good move*
- *Perhaps non-governmental Public Authorities can be exempted from appointing officer for hearing appeals*

Obligations of public authorities: 4. Duty to display notice re Info Officer and fees

- S26. A public authority shall be required to display in a conspicuous place within its official premises, a notice specifying the name, designation and contact details of the information officer and the name of the officer designated to entertain appeals under section 23 and such officers contact details, fees being charged for obtaining any information from such public authority and the contact details of the Commission. The fees so specified shall be as determined in accordance with the fee Schedule determined by the Commission under section 14.
- *Non-governmental public authorities should be exempted from this obligation*

Laws must take into account costs of compliance; costs < benefits

- What is a negligible cost to a government department with excess employees can cripple a small business or a small NGO
- This will lead to disputes that may overload RTI Commission and make it incapable of attending to core business
- Solutions
 - *One set of duties for large organizations above a defined threshold*
 - *But threshold difficult to set, especially with regard to organizations that fall with the scope based on “agent of agent” rationale*
 - *More practical to divide “public authorities” into two categories as is done in South Africa and impose the onerous duties only on the government “public authorities”*
 - *Or leave room for RTI Commission to formulate rules to lessen cost of compliance*

RTI is meant for government; not for those who do not use tax-payers' money

- Government organizations have a principal-agent relationship with the citizens who created them and who they act on behalf of
 - Therefore, it is acceptable (even necessary, in the context of the P-A relationship) to impose RTI on government organizations, though even here, all RTI statutes provide exception clauses
- Most, if not all, government organizations are monopolies (or they should be) and will not be harmed by disclosure of information
 - It is commonly understood that information is a critical element in competition
 - An RTI Act should not provide the tools to gain access to internal information that has competitive implications

In other countries, efforts to seek competitor information dominate

- On the UK experience: “Mr. [Tony] Blair and Lord [David] Clark envisioned ordinary citizens primarily using the act. But according to Ms. Park, a substantial proportion of requests come from corporations “asking about subcontracting opportunities and so on.” That is not unusual. **In the United States and Canada, the largest single user group is companies seeking information about their competitors or regulators, and the pattern is similar in other countries with F.O.I. laws.**” (Clarke, B. (2015 April 11), “From A to Z (Asteroids to Zombies), the British Just Want the Facts,” *International New York Times*)

The safeguard against competitive prying does not extend to foreign companies

- S.5(d): “the disclosure of such information would reveal any trade secrets or harm the legitimate commercial interests or the competitive position of any person, unless that person has consented in writing to such disclosure” is only safeguard for competitively sensitive information
 - ~~But a “person” protected is defined as “a person or any body of persons, whether corporate or unincorporated or registered in Sri Lanka”~~
 - ~~A foreign company that falls within the ambit of public authority will not be able to use this exception~~
- ‘Person’ is not defined in newest version of bill – therefore who does s 5(d) apply to?*
- *Need to extend protection to foreign entities if we are to engage in international trade in goods and services and attract investment*

Offences

- S.42(1). Every person who willfully
 - (a) denies to provide information required under the provisions of this Act; deliberately slow down the provision of information or intentionally provide incorrect, incomplete or inaccurate information;
 - (b) destroy, invalidate, alter or totally or partially conceal information under his or her custody, or to which he or she has access to or knowledge of due to the exercise of his or her position, job or public function;
- shall be guilty of an offence under this Act and shall on conviction after summary trial by a Magistrate be liable to a fine not exceeding twenty five thousand rupees or to imprisonment for a term not exceeding three years or to both such fine and imprisonment.

Some help with the worst job in government

- S. 42(3) Any officer whose assistance was sought for by an Information Officer under subsection (3) of section 23 and who fails without reasonable cause to provide such assistance, shall be guilty of an offence under this Act, and shall on conviction after summary trial by a Magistrate be liable to a fine not less than ten thousand rupees.
- S. 42(4) A fine imposed for the commission of an offence referred to in subsection (1), (2) or (3) of this section, shall be in addition and not in derogation of any disciplinary action that may be taken against such officer by the relevant authority empowered to do so, for the failure to carry out a duty imposed under this Act.

South Africa: Public bodies and private bodies subject to RTI, but differently

- Promotion of Access to Information Act 2 of 2000 (PAIA) applies to ‘private bodies’ as well as ‘public bodies’
 - Section 1; ‘Private body’ means-
 - a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
 - (b) a partnership which carries or has carried on any trade, business or profession; or
 - (c) any former or existing juristic person, but excludes a public body
- But rights of access to records of public and private bodies differ:
 - S.50. Right of access to records of private bodies (1) A requester must be given access to any record of a private body if- (a) that record is required **for the exercise or protection of any rights**

South Africa

- South African provision regarding ‘exercise or protection of any rights’; similarly worded to the Sri Lanka Constitutional provision
- But
 - Applies only to private bodies
 - No such limitation in Sri Lankan provision

South Africa: How has 'protection of any rights' been interpreted?

- To establish entitlement to records from a private body, the requester must
 - state what right they wish to exercise or protect,
 - the record required,
 - and why that record is required to exercise or protect that right

South Africa: What constitutes a 'right' for purpose of access to records of a private body?

- Broadly interpreted by courts
- The use of the word 'any' immediately prior to 'rights' in section 50 of PAIA indicates an intention on the part of the legislature to ensure the broadest possible interpretation of what qualifies as a right (*M&G Media v 2010 FIFA World Cup Organizing Committee*)
 - BUT rights relied on for the purposes of seeking access to information of a private body must be justiciable rights; the right must give rise to a legal action (*IDASA v ANC* and others)

Source; PAIA unpacked, a resource for lawyers and paralegals (2013)
South African History Archive (SAHA), Freedom of Information Program

South Africa: Examples from case law on 'Protection of any rights'

- Issue: Payments were allegedly made by a member of the ANC to journalists of Independent Newspapers in exchange for favorable coverage. Records relating to internal ANC investigation were requested by the owner/ publisher of the newspaper
- Courts recognized that the information was required to protect the right to freedom of expression and the right to reputation
- Under the South African Constitution right to freedom of expression includes freedom of the press and freedom to receive or impart information or ideas; s 16(1)
- Applicants claimed the information was required to report on matters of 'general public interest'

Independent Newspapers (Pty) Limited and others v the African National Congress (ANC) and another (2011)

South Africa: Case law on private bodies

- Fortuin v Cobra Promotions CC (2010)
 - Financial records of a company that would allow the requester to calculate the value of his 50 percent interest in the company were recognized as being required to exercise or protect a contractual right
- Earthlife Africa v Eskom (2005)
 - Records related to the development of the Pebble Bed Modular Reactor for the generation of nuclear electricity were recognized to be required to exercise the (although the records were ultimately determined to be exempt from release under different grounds)
 - Constitutional right to an environment that is not harmful to a person's health or wellbeing and to protect the environment

- Access to the books of a company were denied to a shareholder on the basis that the allegations that ‘relatively minor errors or irregularities’ had occurred was not a sufficiently substantial foundation to establish the records were required to exercise the requesters rights as a shareholder
- Held that “in enacting PAIA Parliament could not have intended that the books of a company, great or small, should be thrown open to members on a whiff of impropriety or on the ground that relatively minor errors or irregularities have occurred. A far more substantial foundation would be required”

Clutcho (Pty) Ltd v Davis (2005)

South Africa; What rights of access apply to public bodies?

- Requester does not have to justify why the document is required
- Entitlement to the document is presumed
- Definition of public bodies (section 1) includes ‘any other functionary or institution when- (ii) exercising a public power or performing a public function **in terms of any legislation**’
- E-g; Mittalsteel South Africa (formerly ISCOR limited) a steel producer in South Africa was found to be a public body because, among other things, it
 - Was established by proclamation;
 - Could not amend its memorandum of association without an act of parliament;
- Mittalsteel’s MoA stated that
 - Shares in the body could only be issued with presidential approval
 - Government exercised a controlling shareholding in the body

India: Who can exercise RTI?

- **S. 3; Limited to citizens.**
- Act does not make provision for giving information to Corporations, Associations, Companies etc.
- However, if an application is made by an employee or office-bearer of any Corporation, Association, Company, NGO etc. indicating his name and such employee/office bearer is a citizen of India, information may be supplied to him/her (Guide to RTI, 2005)

India: Profile of RTI applicants

- The study analysed a sample of RTI applications
- Gender
 - RTI is overwhelmingly used by men (92%)
 - Very few female applicants (national average of only 8%)
- Why? Study did not analyse the reasons
- Only 14% of applicants were from rural areas, though over 70% of India's population lives in rural areas
 - (Note – Study also found that there was poor awareness about the RTI Act. Awareness was less in rural areas when compared with urban areas)
- Socio-economic profile: A significant proportion of the RTI applicants were from among those living below the poverty line and *antyodaya* families, (*Antyodaya* ration cards are given to the poorest of the poor from among those living below the poverty line)

India: What do requesters want to know?

- Nearly 70% of the RTI applications seek information that should either have been made public proactively (under section 4) or communicated to the applicant without an RTI application
- A large proportion of the RTI applications are actually disguised complaints and grievances
- The most commonly asked for information
 - About decisions made or being made by public authorities (57%)
 - Queries regarding action taken or proposed to be taken by public authorities (41%)
 - Information about norms (25%),
 - Financial and public resources (20%)
 - Human resources (20%)
 - Enquiries and investigations (26%),
 - Many of the RTI applications sought information on more than one topic

India: Examples of RTI requests

- The applicant wants to have a list of old age home in Delhi, and wants to know the terms and condition to get a room in an old age home. [CEN/MOSJ/ 2013/ENGLISH]
- Queries regarding delays; The applicant filed an application on behalf of his client, whose property sale deed was registered in January 1997 at the office where the RTI application is filed. He now asks why after so many years, the registry document has not been handed over to his client. Says copies of the document and a related legal notice are attached. [DEL/HQ/REV/SUBREGISTRAR/2013/ENGLISH]
- Queries regarding decisions made by public authorities; The applicant wants to inquire about the appointment of an anganwadi worker who received less marks than the applicant in the exam. She had twice earlier submitted applications to the district collector. She pleads for the related information and justice. [AP/ANA/REV /2013/ TELUGU/ TRANSLATED]

India: More RTI queries

- The applicant has asked for a list of books banned by the Govt. of India, name of the respective authors, and reasons for the ban. [CEN/MHA/ 2013/ENGLISH]
- Queries about action taken/ to be taken by public authorities; The applicant says he had filed a complaint against the gram panchayat for fraud and cheating in the works being done in the panchayat, in November 2012. He now asks what action has been taken in response to his complaint
- Complaints disguised as RTI applications; The applicant has filed a complaint using RTI as no action was taken on his earlier complaint against a person who has been misusing the names of Joint collector of Kurnool and looting poor tribal people.[AP/ANA/POL / 2013 /TELUGU]

India: Use of RTI by media

- According to some accounts Indian media do not make much use of RTI, unlike in UK
- However journalists have used RTI to collect information
 - Associate editor of India Today used RTI to find details of foreign trips made by ministers
 - Made 59 applications over four months
 - Found that 71 ministers had made 786 trips over 3.5 years
 - Article gained much media attention

India: Use of RTI by NGOs

- Housing and Land Rights Network used the RTI to get information on Government spending for the 2010 Commonwealth Games
- Found that social development funds (\$164 million) had been re allocated for the Commonwealth Games

India: Proactive disclosure under Indian RTI legislation

- Indian RTI has extensive rules on proactive or routine publication and regular updates
- Obligation of Public Authorities
 - S. 4(1) Every public authority shall
 - (b) publish within one hundred and twenty days from the enactment of this Act,—
 - (i) the particulars of its organization, functions and duties;
 - (ii) the powers and duties of its officers and employees;
 - (iii) the procedure followed in the decision making process, including channels of supervision and accountability
- But no provision for monitoring compliance
- RAAG study found poor compliance by public authorities
- Among the RTI applications analyzed, 49% of all the information asked for was information that it should have been made public proactively

Political parties; a tricky issue in India

- In 2013 the Central Information Commission gave an order stipulating that some of the national political parties (like the Congress, the BJP, the CPM and the CPI) were public authorities and came under the purview of the RTI
- Subsequent attempt to amend the RTI Law to remove political parties from jurisdiction of RTI
 - Widely opposed by NGOs and advocacy groups
 - Bill introduced in Parliament but lapsed when Parliament dissolved

India: Problems that Information Officers face

- RAAG study; Nearly 45% of the PIOs stated that they had not received any training on the RTI Act. PIOs interviewed identified lack of training as their number one constraint
- 38% PIOs spent less than 2 hours a week on RTI related work, while 39% spent less than 5 hours a week
- Request for voluminous information was the major difficulty faced by PIOs in responding to RTIs, followed by unclear applications
- Under section 14 (g) of the Sri Lankan Bill, duties of the Commission include the duty to 'co-operate with and undertake training activities for public officials on the effective implementation of this Act'
- Important that this provision is implemented
- Provisions on training are included in the law but implementation seems to have been ineffective?